

STATE OF MICHIGAN
COURT OF APPEALS

SHERYL MITCHELL,

Plaintiff-Appellant,

v

HARANATH POLICHERLA, M.D., P.C., d/b/a
POINTE MEDICAL CENTER, POINTE
MEDICAL CENTER, P.C., and THULASHI
DIVI, M.D.,

Defendants-Appellees.

UNPUBLISHED

May 22, 2003

Nos. 237578; 238217

Wayne Circuit Court

LC Nos. 00-002058-NH;
01-110867-NH

Before: Cooper, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals as of right from multiple judgments granting defendants' motions for summary disposition. Two separate lawsuits were filed below by plaintiff, both arising out of the alleged medical malpractice of defendants for failure to timely diagnose and properly treat plaintiff relative to a lesion in plaintiff's left breast that was ultimately diagnosed as being highly suggestive of malignancy. Both suits were summarily dismissed.¹ We affirm in part, and reverse and remand in part.

After thoroughly reviewing and unraveling the proceedings in the trial court, we come to the following conclusions. Plaintiff's claims predicated on the failure to produce medical records and alteration of medical records were summarily dismissed in the first action on the basis that there is no recognizable cause of action under either theory. Additionally, with respect to failure to produce records, the claim was dismissed because only "access" to records is required under MCL 600.2912b(5), and because plaintiff initially failed to sign an authorization to release records. Therefore, it can be said that both those claims were effectively dismissed for failure to state a cause of action, MCR 2.116(C)(8), and further, in regard to the failure to produce claim, for there being no genuine issue of material fact, MCR 2.116(C)(10).

¹ For purposes of this opinion, the lawsuit filed on January 21, 2000, will be referred to as the "first action," and the suit filed on March 30, 2001, shall be referenced as the "second action."

Plaintiff's medical malpractice claim was summarily dismissed in the first action because the statute of limitations had expired, MCR 2.116(C)(7).² With respect to the statute of limitations, the trial court incorporated defendants' arguments in support of its rulings, and those arguments focused on the date plaintiff's malpractice claim accrued.³ Concerning the second action predicated solely on medical malpractice, the trial court also dismissed the action based on expiration of the statute of limitations. Additionally, the second action was dismissed on the basis of prior judgment or res judicata, MCR 2.116(C)(7), and MCR 2.116(C)(6).⁴ With these conclusions in mind, we now address the parties' appellate arguments.

Plaintiff asserts error associated with the visiting judge's ruling, the statute of limitations ruling with respect to both actions, and the rulings dismissing the claims for failure to produce medical records and alteration of medical records. Additionally, plaintiff maintains that MCL 600.2912b and MCL 600.2912d are unconstitutional as violative of due process and equal protection. Because we find that plaintiff's appellate arguments, except those regarding the statute of limitations and the visiting judge's ruling, are inadequately briefed, our focus is narrowed considerably. Moreover, any discussion related to the second action is unnecessary. If the medical malpractice claim in the first action was properly dismissed pursuant to the statute of limitations, the second action was also necessarily time-barred, where the allegations of malpractice were identical.⁵ If the first action was improperly dismissed, the second action cannot proceed in light of MCR 2.116(C)(6), which directs dismissal of a second lawsuit where two actions are pending regarding the same parties and same claims. See *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 666; 341 NW2d 783 (1983). We recognize that this reasoning does not look at the trial court's ruling in the second action from the perspective that at the time, the first action was being dismissed with prejudice by the court. In that sense, prior judgment-res judicata clearly barred the second action. MCR 2.116(C)(7); *Sewell v Clean Cut Mgt, Inc*, 463

² We reach this particular conclusion because in settling the order on the visiting judge's ruling from the bench in the first action (dismissal without prejudice for failure to file an affidavit of merit), the trial court entered an order dismissing the medical malpractice claim finding that it was time-barred. The trial court did not expressly reverse or vacate the visiting judge's ruling. Rather, the trial court, in effect, found the visiting judge's ruling to be irrelevant in light of the bar under the statute of limitations. In finding that plaintiff's malpractice action was time-barred, the trial court's order dismissing the action created a dismissal with prejudice; therefore, it would not have been proper to incorporate the visiting judge's ruling that dismissal was without prejudice. Remembering that a court speaks through its written judgments and orders, *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977), because the visiting judge's ruling had not been finalized by the entry of an order, the trial court had the authority to consider additional arguments in support of dismissing the first action prior to the entry of the order dismissing the action. See MCR 2.602(A)(1)(all judgments and orders must be in writing).

³ Defendants also argued below that plaintiff failed to file suit within six months of discovering her cause of action. See *infra* footnote 6.

⁴ MCR 2.116(C)(6) provides for dismissal where "[a]nother action has been initiated between the same parties involving the same claim."

⁵ We hold *infra* that if dismissal of the first action was premised in any part on failure to file an affidavit of merit, it was improper.

Mich 569, 575; 621 NW2d 222 (2001). Our point is merely that the second action, and the rulings thereon, have become irrelevant.

Regarding plaintiff's constitutional argument, there is no citation of any authority and no meaningful discussion of how the medical malpractice statutes particularly violate due process and equal protection principles. The argument is devoid of any minimal analysis and explanation. As our Supreme Court stated in *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959):

“It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.”

Therefore, we shall not address plaintiff's constitutional argument.

Regarding plaintiff's argument that the trial court erred in dismissing the claim for failure to produce medical records, plaintiff, once again, fails to cite any authority and fails to address, challenge, or distinguish the authority relied on by the trial court below in dismissing the action. Moreover, plaintiff fails to address in any manner the language in MCL 600.2912b(5) pertaining to “access” rights and the issue of timely authorization; both of which formed the basis of the trial court's ruling. Thus, plaintiff has effectively waived any appellate review. *Mudge, supra* at 105.

Regarding plaintiff's argument that the trial court erred in dismissing the claim premised on alteration of medical records, it is inadequate because it fails to address and distinguish, in any meaningful manner, the authority relied on by the trial court in support of its ruling, nor does the argument provide any meaningful discussion on or support for the proposition that Michigan has recognized, or should recognize, an independent cause of action for alteration of medical records. A single citation to an Ohio case without any discussion is insufficient. Thus, plaintiff has effectively waived any appellate review of this issue. *Mudge, supra* at 105.

Plaintiff argues that the visiting judge erred in summarily dismissing the first action with respect to the medical malpractice claim, where an amended complaint had been filed along with an affidavit of merit before the judge's ruling from the bench. Rulings on motions for summary disposition are reviewed de novo by this Court. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We agree that in light of the fact that an amended complaint and affidavit of merit had been filed, as permitted by the trial court, the visiting judge erred in ruling from the bench that summary disposition was appropriate based on failure to file an affidavit of merit with the original complaint. The visiting judge, in essence, dismissed the original complaint which was no longer of any relevance. To the extent that the trial court's order dismissing the first action incorporated by implication in any manner the visiting judge's oral ruling from the bench, it was error.

This leaves only the issue whether the first action for medical malpractice was time-barred. If no facts are in dispute and reasonable minds could not differ concerning the legal

effect of those facts, whether a cause of action is barred by the applicable statute of limitations is a question of law for the trial court, which we review de novo. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999). Generally, the statute of limitations in a medical malpractice action is two years from the act or omission that forms the basis of the claim or within six months after the plaintiff discovers or reasonably should have discovered the potential claim. MCL 600.5805(5); MCL 600.5838a(1) and (2). Here, plaintiff only cites the two-year statute of limitations found in MCL 600.5805(5) in support of her position.⁶

We agree with plaintiff that the statute of limitations ceased running at the time the amended complaint and affidavit of merit were filed, which was on October 11, 2000. MCL 600.2912d(1); *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000).⁷ Plaintiff fails to raise any issue of possible tolling during the statutory notice period under the provisions of MCL 600.5856(d); therefore, we shall not address that statute. Plaintiff does argue that the limitation period was equitably tolled from September 10, 1999 (notice of intent) to March 27, 2000 (copies of records released) because of defendants' alleged withholding of plaintiff's medical records. Plaintiff fails to adequately brief the issue of equitable tolling, *Mudge, supra* at 105, and we note that plaintiff made no attempt to request time extensions pursuant to MCL 600.2912d(2) and (3). The record does not reveal plaintiff's entitlement to equitable principles. Therefore, plaintiff's action for medical malpractice needs to have accrued within the two-year period prior to October 11, 2000, in order to survive summary disposition.

Plaintiff's amended complaint identified numerous instances of alleged malpractice some of which occurred through April 1999, which date is within the two-year limitation window. In particular, plaintiff alleged failure to perform a spot compression prior to April 1999 and failure to refer to a surgeon prior to April 1999. Additionally, without reference to dates, there are general allegations of failure to properly monitor the progression of plaintiff's condition, failure to properly diagnose plaintiff's condition, and failure to properly treat plaintiff's condition.

Defendants' position below, which was adopted by reference by the trial court, was that plaintiff's cause of action accrued in December 1996 when a mammography was allegedly first discussed with plaintiff. Plaintiff's and her husband's affidavits indicated that a mammography was never recommended in 1996. Of course the affidavits thus suggest that a claim for malpractice accrued in 1996; however, defendants and the trial court failed to recognize that there were subsequent independent instances of alleged malpractice aside from those related to

⁶ Were we to consider the six-month discovery provision found in MCL 600.5838a(2), it would not benefit plaintiff. The mammogram that indicated a malignancy was performed in April 1999, which would be the time that plaintiff knew or should have known of a possible cause of action. Even tolling the statute of limitations during the 182-day notice period pursuant to MCL 600.5856(d), the filing of the amended complaint and affidavit of merit on October 11, 2000, was well beyond the six-month discovery period.

⁷ In *Scarsella, supra* at 551-552, our Supreme Court stated that "a plaintiff who files a medical-malpractice complaint without the required affidavit is subject to dismissal without prejudice, and can refile properly at a later date. However, such a plaintiff still must comply with the applicable period of limitation." The filing of a complaint without an affidavit of merit is ineffective and does not toll the applicable statute of limitations. *Id.* at 553.

doctor visits in late 1996. This is not a case where plaintiff saw defendants only in 1996 without any subsequent involvement by defendants in plaintiffs' medical care. If such were the case, we would agree that a cause of action accrued solely in 1996, and that would be the only date to consider. MCL 600.5838a(1) specifically provides that an action for medical malpractice "accrues at the time of the act or omission that is the basis for the claim of medical malpractice" Accordingly, with allegations of multiple acts or omissions, different accrual dates would be involved. If this were not the case, a healthcare professional could commit an initial act of malpractice and not be held liable for subsequent acts of malpractice in treating the same patient if a lawsuit is not filed within two years of the initial act of malpractice.⁸

In terms of acts and omissions that occurred before the two-year period running up through October 11, 2000, plaintiff is time-barred from pursuing a claim for medical malpractice. Because defendants' motions for summary disposition focused on the initial alleged act of malpractice in 1996, plaintiff was not obligated or required to present documentary evidence to create an issue of fact with regard to later acts or omissions of alleged malpractice. MCR 2.116(G). As such, it was error for the trial court to dismiss plaintiff's entire medical malpractice action on the basis of the statute of limitations.

In conclusion, we cannot say that the trial court erred in dismissing claims predicated on failure to produce medical records and alteration of medical records, where plaintiff has inadequately briefed the issues for appellate review. Additionally, appellate review of plaintiff's constitutional argument is waived for failure to submit an adequate brief. Next, there was no basis to dismiss plaintiff's medical malpractice claim in the first action for failure to file an affidavit of merit, where one was filed with an amended complaint before the hearing to dismiss was held. Regarding the medical malpractice claim in the second action, it cannot survive in light of our ruling that the first action is to remain open. MCR 2.116(C)(6). Finally, with regard to the statute of limitations and the medical malpractice claim in the first action, the claim was improperly dismissed in its entirety because plaintiff alleged some negligent acts or omissions that were not time-barred.

Affirmed in part, and reversed and remanded in part. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ William B. Murphy

⁸ We wish to make clear that we are not suggesting that plaintiff can proceed under a continuing-wrong or continuing-treatment theory of accrual. This Court has rejected any continuing-wrong or continuing-treatment rule in the context of time-bar analysis in a medical malpractice action for purposes of determining an accrual date. *McKiney v Clayman*, 237 Mich App 198, 208; 602 NW2d 612 (1999).